



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1395/15

In the matter between

MODIBA MOTLATJO WASHINGTON

Applicants

AND OTHERS

and

AMT PLACEMENT SERVICES

First Respondent

METAL AND ENGINEERING BARGAINING COUNCIL

Second Respondent

ITUMELENG WILLIAMS

Third Respondent

Heard: 21 July 2017

Delivered: 25 October 2017

Summary: Rescission application: The Labour Court dismissed the Applicants' statement of claim due to their non-attendance after the Labour Court issued a notice of set down to the Applicants' attorneys. Applicants applied for rescission of the order on the basis that the order was issued

erroneously in the absence of a party affected by it. The rescission application dismissed as the order was not issued erroneously.

JUDGMENT

MOLEBALOA AJ

Introduction

- [1] This is an application for the rescission and setting aside of the Court Order granted by Honourable Justice Van Niekerk dated 01 September 2016. The application is opposed

Background

- [2] The Applicants launched a review application following an award made against them by the Third Respondent.
- [3] The Registrar of this Honourable Court sent a Notice of Set down enrolling the application for a hearing on 01 September 2016 at 10:00, 6th Floor, Arbour Square, corner Juta and Melle Streets, Braamfontein, Johannesburg.
- [4] The Notice of Set down was faxed to the Applicant's attorneys, Ndobela & Lamola.
- [5] On 01 September 2016 the Honourable Justice Van Niekerk dismissed the application in the absence of the Applicants. Their attorneys were also not in attendance.

- [6] On 06 September 2016 the Applicants' attorneys discovered a fax containing a Notice of Set Down informing parties that the matter was enrolled for hearing on 01 September 2016. Upon enquiring with the Labour Court, they were informed that the Notice was sent to the Applicants' attorneys by facsimile on 25 August 2016. They then learned on 14 September 2016 after the judgment was typed that their review application was dismissed with costs on 01 September 2016 by the Honourable Justice Van Niekerk.
- [7] The Applicants' attorneys indicated that they experienced problems with their fax line and same was reported to Telkom. Reference was made to Telkom short messages services (sms) acknowledging receipt of the complaint. The problem was fixed as on 25 August 2016.
- [8] The Applicants contended that they did not wilfully absent themselves from court as their failure to attend was due to technical challenges involving Telkom fax line.

Application for rescission

- [9] The Applicants then applied for the rescission of the order. In their Notice of Motion the Applicants, however, indicated that they were reviewing and setting aside the award made by Honourable Justice Van Niekerk dated 01 September 2016. They later applied to amend the Notice of Motion to read "rescinding the order" and not "reviewing and setting aside the award". The Third Respondent vehemently opposed the amendment.
- [10] I granted the amendment as the application clearly was for the rescission of the order and not for the reviewing or setting aside of the award. The application was identified as a rescission application. It was only in the prayers part of the Notice of Motion that reference was made to the "review". To me this is pardonable. It was a typographic error.

[11] The Applicants did not clearly set out in their application whether they were relying on Rule 16A (1)(a)(i) or Rule 16A(1)(a)(ii) of the Labour Court Rules. As I demonstrated hereunder, the requirements to be satisfied in the two provisions are different. Sometime after the Applicants had filed the rescission application, they attempted to supplement their rescission application by introducing averments dealing with the prospects of success which were clearly not pleaded in the first set of rescission application papers. Advocate Choeu however clarified the Applicants' case as she indicated to the Court that it should ignore the supplemented application and confine itself to the first set of papers which make no reference to the prospects of success as their application is based on Rule 16A(1)(a)(i) and not Rule 16A(1)(a)(ii) of the Labour Court Rules.

The applicable legal principles

[12] Section 165 of the Labour Relations Act¹ (LRA) read together with Rule 16A of the Labour Court Rules governs the variation and rescission of judgments and orders of the Labour Court.

[13] Since Rule 16A (1) mirrors the provisions of Section 165 of the LRA, I only quote herein the provisions of Rule 16A of the Labour Court which states that:

- “(1) The court may, in addition to any other powers it may have-
- (a) of its own motion or on application of any party affected , rescind or vary any order of judgment-
 - (i) erroneously sought or erroneously granted in the absence of any party affected by it;
 - (ii) in which there is an ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission;
 - (iii) granted as the result of a mistake common to the parties;
 - (b) on application of any party affected, rescind any order of judgment granted in the absence of that party
- (2) Any party desiring any relief under-

¹ Act 66 of 1995 as amended.

- (a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
- (b) subrule 1(b) may within 15 days after acquiring knowledge of an order of judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit".

[14] There is a distinction between an application brought in terms of Rule 16A(1)(a)(i) and Rule 16A(1)(b). The requirements for the two sub-sections are also different. In terms of Rule 16A(1)(a)(i), applicants are not expected to show good cause for them to succeed. They only need to show that the judgment or order was erroneously issued in their absence. Rule 16A(1)(b), on the other hand, requires the applicants to show good cause in order to succeed.

[15] The above principle was applied in the case of *Bayete Security Holdings v Mokgadi and Others*² where the Labour Court distinguished between Rule 16A(1)(a)(i) and Rule 16A(1)(b). According to the court, Rule 16A distinguishes between judgments erroneously granted in the absence of a party (e.g. where notice was not given to a party) and judgments granted in the absence of a party other than erroneously (e.g. where notice had been properly given but the party was nevertheless absent). In the first situation, there is no need to show good cause and there are no time limits, whereas, in the second situation, good cause must be shown and the application must be brought within the prescribed time limit. This was quoted in approval in the case of *Mphahlele v Muswede*³.

[16] The Applicants launched their application in terms of Rule 16A(1)(a) which means that they only have to prove that the order was issued erroneously in

² (2000) 9 BLLR 1020 (LC).

³ (JS 173/14(2017) ZALCJHB 20 (25 January 2017).

their absence. How this question has to be answered is to determine whether there existed a fact, at the time the order or judgment was made which the court was not aware of and that had it been aware, it would not have made the order as it did. Such was enunciated in *Beveral Investment T/ A KFC v Fraser and Another*⁴ where the court said:

“..the enquiry which the court has to conduct in determining whether the order of judgment which is the subject of the rescission application was erroneously made essentially entails investigating whether there existed a fact, at the time the order or judgment was made, which the court was not aware of and that had it been aware it would not have made the order as it did”.

[17] This enquiry was further also supported in the *Department of Correctional Services v Abel Montgomery Baloyi*⁵ where the court found:

“It is now well established in our law that a litigant affected by a judgment / or order granted in default can have such an judgment / or order rescinded on the basis of showing that the it was granted erroneously or by showing good cause for the default. In this respect the court has a discretion to rescind a judgment /or order erroneously granted or sought in the absence of an affected party. The order of judgment will also be erroneously granted if it is shown that there was an irregularity in the proceedings or that the court did not have the competency to grant the order or judgment. The authorities are in agreement that there is no need to show good cause where it has been shown that the default judgment was erroneously sought or granted. It has also generally been accepted that a judgment is erroneously granted if, at the time of granting it, there existed facts which the court had not been aware of and that had it been aware, it would not have granted the judgment or the order”.

⁴(2015) ZALCJHB 17 at para. 10.

⁵ (2016) 37 ILJ 22852 (LC) at para. 13.

- [18] The Notice of Set down was properly served on the Applicants' attorneys. The contention that they did not receive the notice of set down as a result of technical problems is incorrect. The only technical problem the Applicants mentioned in their rescission application was the defective Telkom lines. However, they were repaired as Telkom notified the Applicants' attorneys on 25 August 2016 that the lines were in order. I agree that the lines were indeed fixed as at 25 August 2016 as that is the day the Notice of Set Down was sent to the Applicants' attorneys. The Notice was successfully transmitted. It was received. The problem is that the Applicants' attorneys only noticed it on 06 September 2016. If the problem was technical then the Notice could not have been successfully transmitted. There is nothing technical about not reading incoming correspondences. This is what happened in the matter *in casu*. The correspondence received on 25 August 2016 was only given attention on 6 September 2016.
- [19] The notice was therefore properly served on the Applicants' attorneys. There was no irregularity in the proceedings. In line with the above quoted authorities the order in the matter *in casu* was not erroneously made. There existed no facts which the court had not been aware of and that had it been aware, it would not have granted the judgment or the order".
- [20] The Applicants decided not to launch its application in terms of Rule 16A(1)(b) where it would have been expected to show good cause. Since that was not the Applicants' case as clearly explained by Advocate Choeu, the good cause requirement plays no role. Even if I could be tempted to look into whether or not good cause was shown, the Applicants did not plead in their papers as they stand, prospects of success which is a relevant factor to be considered when determining whether good cause was shown.
- [21] In short, the Applicant's application failed to comply with the requirements enunciated in Rule 16A(1)(a)(i). The order by Honourable Justice Van Niekerk was not erroneously made.

[22] Accordingly, I issue the following order:

Order

1. The rescission application is dismissed.
2. There is no order as to costs.

MOLEBALOA MS

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate Choeu.

Instructed by: Ndobela & Lamola Attorneys.

For the Respondents: Mr. D.O Pretorius of Fluxmans Inc.